

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

GLENN EDWIN DEATON
SHERRI KAY H. DEATON)

Debtors

WADE M. HARN)

Movant

v.

GLENN EDWIN DEATON
SHERRI KAY H. DEATON)

Respondents

Chapter 7 Case

Number 91-40498

ORDER ON MOTION TO DISMISS

Wade M. Harn filed a Motion to Dismiss the above-captioned Chapter 7 case on June 29, 1992, and the matter was heard on July 21, 1992. The Movant alleged that Debtors had understated their income on Schedule "I" of the petition, that the Debtors appeared to have \$454.00 per month in disposable income which could be paid into a Chapter 13 plan, and that the Chapter 7 case was not filed in good faith.

Evidence at the hearing revealed that Debtors' schedules showed \$1,733.33 in monthly take-home pay for the Debtor/Wife. However, it was stipulated that her actual net income for the first six months of 1992 was \$2,283.00. The Movant argues that this misrepresentation coupled with the long history of this case leads to a conclusion that Debtors have not acted in good faith with respect to seeking relief under Chapter 7.

The Court's file revealed that the case was originally filed as a Chapter 7 case on March 7, 1991. Debtors' motion to convert their initial Chapter 7 case to a Chapter 13 was filed on June 17, 1991. On the same day Debtors were ordered to file their Chapter 13 plan within fifteen days. On July 11, 1991, when the deadline for Debtors' acting had passed, the United States Trustee filed a Motion to Dismiss and a hearing was scheduled on that Motion for August 20, 1991. At that hearing Wade Gastin appeared as substitute counsel for the Debtors and represented that the Chapter 13 petition, plan and schedules had been filed the previous date. In fact, the plan was filed on August 19th proposing payments of \$225.00 bi-weekly for 36 months. At that point the case had been pending over five months.

The petition and schedules filed on August 19th revealed that the Debtor/Husband earned \$1,917.50 gross with a net take-home pay of \$1,497.16 and that Debtor/Wife earned \$2,491.67 gross with a net pay of \$1,911.00. An order was issued September 30, 1991, directing the Chatham County Police Department to withhold the sum of \$225.00 bi-weekly from Debtor's pay. On January 14, 1992, the first confirmation hearing was held in the Debtors' case. The case was ten months old at this point. Numerous objections were filed and asserted at confirmation. As of that date the Debtors had paid no money to the Chapter 13 Trustee and were delinquent in the amount of \$1,297.32. The Trustee revealed that funding was insufficient and that a minimal plan would require funding at the rate of \$641.00 per month for 60 months. A salary order was issued to the Debtor/Wife's employer for that amount.

At that time counsel for Wade Harn objected to confirmation alleging bad faith in that Debtors had failed to

make payments to the plan, that the Chapter 13 case had been pending since June, and that expenses in the budget were overstated while income was understated. Counsel for the Debtors revealed that Debtor/Husband had left his employment with the County and had been unable to pay due to loss of income and an increase in child support obligations. The Court continued the confirmation hearing and directed the Debtors to make direct payments until deductions began.

A continued confirmation hearing was scheduled for March 27th at which time Debtors' counsel revealed that Debtor/Husband was unemployed, had suffered a back injury, was not fit to work and requested the opportunity to convert to Chapter 7. At that time the Trustee revealed that the plan was underfunded at \$641.00 per month and needed \$867.00 for 36 months in order to pay a minimal dividend. The Trustee had received \$1,982.68 which represented proceeds of a garnishment which was levied against Debtors and subsequently turned over to the Trustee. The Trustee's records revealed that the only monies ever received directly from the Debtors or as a result of salary orders issued during the pendency of the Chapter 13 was a money order received February 21, 1992, in the amount of \$580.00. As a result Debtors were \$5,845.00 delinquent in their payments, and the case was nearly one year old.

Debtors requested ten days to convert the case but because of the previous history in the matter the Court ordered that the conversion be filed by 5:00 o'clock p.m., that date, that Debtors would not be permitted to reconvert to a Chapter 13 and that in the event Debtors failed to file necessary papers to reconvert by 5:00 o'clock p.m., on March 27, 1992, the case would be dismissed with prejudice against refiling for six months. The notice of conversion, voluntary petition, and applicable schedules were timely filed.

The thrust of the creditor's argument is that the originally filed Chapter 7 was converted to a Chapter 13 in response to a motion by the United States Trustee to dismiss their case which alleged that Debtors were able to fund a Chapter 13 and that permitting them to obtain relief under Chapter 7 would constitute a substantial abuse as contemplated by 11 U.S.C. Section 707(b). Debtors contended that the Chapter 13, while feasible at the time of the original conversion, had become infeasible due to Debtor/Husband's subsequent health history and that Debtors should not be penalized for omissions or errors in their schedules.

The schedules filed on March 27, 1992, showed Debtor/Husband's income at \$866.67 per month take-home and Debtor/Wife's income at \$2,491.00 gross and \$1,733.33 net. As to the wife this represented the same gross income as previously scheduled, but approximately \$200.00 less in net income. Amended schedules were filed May 11th and June 1, 1992. However, no amended budget was included in either amended filing. It is now stipulated that wife's net income for the first six months of 1992 was actually \$2,288.00 or \$549.67 more per month than the amount revealed.

Section 707(a) of the Bankruptcy Code provides that the court may dismiss a Chapter 7 case for cause after notice and a hearing. One example of cause listed in Section 707(a) is "unreasonable delay by the debtor that is prejudicial to creditors." The examples in Section 707(a) are non-exclusive. Implicit in Section 707(a) is the requirement that the petition be filed in good faith. In re Zick, 931 F.2d 1124 (6th Cir. 1991); In re Sky Group Intern., Inc., 108 B.R. 86 (Bankr. W.D.Pa. 1989); In re Maide, 103 B.R. 696 (Bankr. W.D.Pa. 1989); In re Hartford Run Apartments of Buford, Ltd., 102 B.R. 130 (Bankr. S.D. Ohio, 1989); In re Brown, 88 B.R. 280 (Bankr. D. Hawaii, 1988); In re Kragness, 63 B.R. 459 (Bankr. D.Or. 1986). A debtor's lack of good faith has been recognized as a valid basis to dismiss a case for cause under Section 707(a), Zick, 931 F.2d at 1126. "Good faith," although not defined in the Code, requires a showing of debtor's honest intentions. Sky Group Intern., 108 B.R. at 90; Johnson v. Vanguard Holding Corp., 708 F.2d 865 (2nd Cir. 1983). See generally In re Fawcett, 785 F.2d 588 (11th Cir. 1985). Good faith must be determined on an *ad hoc* basis considering whether or not the provisions, purpose, or spirit of the bankruptcy laws have been abused. Sky Group Intern., 108 B.R. at 90. Once good faith has been put in issue, debtor has the burden of establishing good faith. In re Frisch, 76 B.R. 801, 804 (Bankr. D.Colo. 1987).

To show cause under Section 707(a), a creditor must prove more than debtor's ability to pay. Id. at 803. Ability to pay is an appropriate factor only in determining whether or not to dismiss a case for "substantial abuse" under Section 707(b). In re Kelly, 841 F.2d 908 (9th Cir. 1988); In re Natale, 136 B.R. 344 (Bankr. E.D.N.Y. 1992). Clearly, a creditor cannot allege ability to pay and other Section 707(b) substantial abuse factors as a basis for dismissal for cause. Id. Rather, there must be a showing of bad faith or other egregious circumstances under Section 707(a). A party in interest has a difficult burden when attempting to dismiss a case for cause. See generally Natale, 136 B.R. at 352. See also 11 U.S.C. §§303(a), 706(c).

The general factors used to determine the existence of good faith include the following:

- (a) [F]rivolous purpose, absent any economic reality;

- (b) lack of an honest and genuine desire to use the statutory process to effect a plan of reorganization;
- (c) use of a bankruptcy as a device to further some sinister or unworthy purpose;
- (d) abuse of the judicial process to delay creditors or escape the day of reckoning in another court;
- (e) lack of real debt, creditors, assets in an ongoing business;
- (f) lack of reasonable probability of successful reorganization.

In re Bingham, 68 B.R. 933 (Bankr. M.D.Pa. 1987). See also In re Brown, 88 B.R. 280 (Bankr. D. Hawaii, 1988) (Where debtor/opthamalogist filed bankruptcy for purpose of avoiding payment to patient who became blind after surgery by debtor, petition should be dismissed under Section 707(a) for bad faith). A debtor's lack of candor or completeness in filing schedules and multiple case filings and "procedural gymnastics" indicate bad faith. In re Hammonds, 139 B.R. 535 (Bankr. D.Colo. 1992).

Under Section 707(a), the court should consider the debtor's honesty and cooperation in filing income and expense schedules with the court as well as any allegations of ill health, calamity, or other hardship. Maide, 103 B.R. at 700.

In Natale, the creditor brought a motion to dismiss under Section 707(a) and a complaint under Section 727(a)(4), alleging that debtor should be denied a discharge for making a false oath about material matters in his bankruptcy petition. Debtor had overstated his rental obligation and failed to list two annuities. The court considered that such errors may have been caused by "oversight, haste, ignorance, misunderstanding or simple inadvertence." Natale, 136 B.R. at 349. Also, the court explained that the debtors could have forgotten about the annuities due to their de minimis value. Id. at 350. The court emphasized that intent to defraud, lacking in the Natale case, must be shown in order to deny a discharge under Section 727(a)(4). The court granted debtor's discharge and refused to dismiss their case.

Similarly, the bankruptcy court in In re Kragness, supra, considered an allegedly bad faith filing under Section 707 commenting that:

11 U.S.C. Section 727 sets forth certain acts, conduct or omissions, by a debtor, which may result in the total denial of discharge in a chapter 7 case. Arguably, any of these acts might be considered cause for dismissal of a bankruptcy case under 11 U.S.C. Section 707.

Kragness, 63 B.R. at 465. The bankruptcy court in Natale used a more lenient interpretation of Section 727 than that required by binding Eleventh Circuit authority under In re Chalik, 748 F.2d 616 (11th Cir. 1984). According to the Eleventh Circuit, it is immaterial whether a debtor intends to injure his creditors when he makes a false statement. Creditors are entitled to judge for themselves what will benefit, and what will prejudice them. Chalik, 748 F.2d at 618. The Chalik court deemed the subject matter of a false oath "material" and thus sufficient to bar discharge if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." Id. In Chalik, the debtor omitted from his schedules twelve corporations, which he claimed were worthless. Nevertheless, the Eleventh Circuit affirmed denial of discharge. See also In re Raiford, 695 F.2d 521, 522 (11th Cir. 1983) (Debtor should not be granted a discharge where debtor knowingly and fraudulently made a false oath or omission in connection with bankruptcy proceedings).

Using the standard of Section 727(a)(4), Debtors' scheduled income constituted a material misrepresentation. Debtor/wife's income was understated by approximately \$550.00 or nearly 25%. Debtors argue that the haste in preparation of the schedules required by 5:00 o'clock p.m., on the date of the continued confirmation hearing should excuse the error. They assert that the income revealed on the Chapter 13 schedules was copied on the new schedules without verification due to time pressures. I disagree. While the wife's gross income was the same, a lower net figure was utilized which establishes that Debtors were asked to reverify their income. Moreover, although Debtors have amended their schedules twice to show increased expenses due to medical bills and child support, no amended budget reflecting actual income has been filed. Debtors have failed to provide a sufficient excuse for the income error on the schedules and to properly amend their schedules. Therefore, I find that the circumstances of this case call for dismissal of Debtors' Chapter 7 petition. The case has remained pending for seventeen months. Debtors have abused the judicial process, enjoyed the benefit of the automatic stay, utterly failed to fund their Chapter 13 while it was pending and signed materially false schedules, under oath upon the

reconversion of their case to a Chapter 7 case. Under the circumstances a dismissal is demanded and the case is, therefore, DISMISSED.

Further because the filing of materially false schedules is fundamentally the same as if Debtors had not filed any schedules prior to the 5:00 o'clock p.m., March 27, 1992, deadline I rule that the dismissal be with prejudice against refiling for 180 days from today pursuant to 11 U.S.C. Section 109(g).

Lamar W. Davis, Jr., United States Bankruptcy Judge

Dated at Savannah, Georgia
This 2nd day of October, 1992.